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No. 90-1599

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DENNIS FELIX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a defendant may be prosecuted for a drug conspiracy after previously having been prosecuted for a substantive drug offense based on the same conduct that is alleged in some of the overt acts of the conspiracy charge.

2. Whether prosecution of respondent for substantive drug offenses in connection with the operation of a drug laboratory in Oklahoma is barred because he was previously prosecuted for attempting to set up a drug laboratory in Missouri, where evidence of his conduct with respect to the Oklahoma laboratory had been introduced in the Missouri prosecution as evidence of his intent to commit the Missouri offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 926 F.2d 1522. The opinion of the district court (Pet. App. 41a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1991. The petition for a writ of certiorari was filed on Apr. 15, 1991, and was granted on October 7, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. On September 15, 1987, respondent was indicted in the Western District of Missouri for attempting to manufacture methamphetamine between August 26, 1987, and August 31, 1987, in violation of 21 U.S.C. 846. Pet. App. 62a-63a. He was convicted and his conviction was affirmed by the Eighth Circuit, 867 F.2d 1068 (1989).

At respondent's trial on the Missouri indictment, the government introduced evidence that on August 26, 1987, respondent met with George Dwinnells, who owned a firm in Tulsa, Oklahoma, that sold scientific equipment and supplies. Unbeknownst to respondent, Dwinnells was a DEA informant. At trial, Dwinnells testified that respondent sought to purchase chemicals and equipment needed to make methamphetamine. Respondent made a down payment of $7,500 toward the purchase and gave Dwinnells instructions for securing a trailer to transport the merchandise. In later telephone conversations, respondent increased his order for chemicals and equipment and instructed Dwinnells to deliver the items to a Joplin, Missouri, hotel on August 31, 1987. Dwinnells met respondent at the hotel on the designated date. Respondent was arrested after inspecting the chemicals and equipment and hitching his car to the trailer in which Dwinnells had transported them. 867 F.2d at 1070-1071.

Respondent's defense in the Missouri case was that "he never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation." 867 F.2d at 1074. Accordingly, the government introduced evidence pursuant to Fed R. Evid. 404(b) that respondent had been involved earlier in 1987 in manufacturing methamphetamine in Oklahoma. See 867 F.2d at 1072-1073. That evidence showed that during the spring of 1987 respondent had bought chemicals and materials for making methamphetamine from Dwinnells and had furnished those supplies to government witness Paul Roach in exchange for lessons on how to manufacture the drug. Roach testified that he and respondent had used the chemicals and equipment to produce methamphetamine in a trailer near Beggs, Oklahoma. On July 13, 1987, law enforcement agents seized the unattended trailer, but they did not arrest respondent at that time. 867 F.2d at 1070-1071.

The trial court instructed the jury as follows with respect to evidence of the Oklahoma transactions:

> You have heard evidence that the defendant previously committed a crime similar to the one charged in this case. You may not use this evidence to decide whether the defendant carried out the physical acts involved in the crime charged here. However, if you are convinced beyond a reasonable doubt, by other evidence, that the defendant did carry out the physical acts involved in the crime charged here, then you may consider this evidence only on the question of motive, opportunity, preparation, plan, knowledge, identity or absence of mistake.

867 F.2d at 1074-1075. Thus, evidence of the Oklahoma transactions was admitted in the Missouri prosecution solely to show respondent's state of mind with respect to the chemicals he arranged to have delivered in Missouri. The Eighth Circuit found the evidence concerning the methamphetamine laboratory in Okla-

homa to be "highly probative of [respondent's] knowledge and intent," and thus admissible under Rule 404(b). 867 F.2d at 1073.

2. On February 16, 1989, respondent was named in eight counts of an 11-count indictment filed in the Eastern District of Oklahoma. Pet. App. 51a-61a. Count 1 charged that he conspired with five other individuals in the Eastern District of Oklahoma and elsewhere between May 1, 1987, and August 31, 1987, to manufacture, possess, and distribute methamphetamine, in violation of 21 U.S.C. 846. Respondent was named in nine of the 18 overt acts that the indictment charged had been committed "[t]o effect the objects of the conspiracy." Pet. App. 53a. Two of the nine overt acts in which respondent was named took place within the time period of the Missouri indictment. Overt act 17 charged that "[o]n August 26, 1987, [respondent], while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." Pet. App. 55a. Overt act 18 charged that "[o]n August 31, 1987, [respondent], while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." *Ibid.*

Respondent was also named in seven substantive counts of the Oklahoma indictment. Counts 2 through 5 charged that on or about July 13, 1987, in the Eastern District of Oklahoma, respondent had manufactured methamphetamine (Count 2), possessed methamphetamine with intent to distribute it (Count 3), possessed methamphetamine oil with intent to manufacture methamphetamine (Count 4), and manufactured phenylacetone, a methamphetamine precursor

(Count 5), all in violation of 21 U.S.C. 841(a)(1). Pet. App. 55a-57a. Count 6 charged that, between June 1, 1987, and July 13, 1987, in the Eastern District of Oklahoma, respondent maintained a place and enclosure for manufacturing methamphetamine, in violation of 21 U.S.C. 856. Pet. App. 57a. Counts 9 and 10 charged that, on or about June 21, 1987 (Count 9) and July 13, 1987 (Count 10), Felix traveled from Texas to the Eastern District of Oklahoma with intent to promote the manufacture of methamphetamine and thereafter attempted to promote that activity, in violation of 18 U.S.C. 1952. Pet. App. 59a-60a.

At trial, the government introduced much of the same evidence that had been introduced in the Missouri trial. Respondent was convicted on all counts and sentenced to serve concurrent 20-year terms of imprisonment on Counts 1 through 6 and five-year terms of imprisonment on Counts 9 and 10. The 20-year sentence imposed for the Oklahoma offenses was set to run consecutively to the sentence imposed for respondent's Missouri conviction.

3. A divided panel of the Tenth Circuit reversed respondent's convictions on Counts 1 through 6 of the Oklahoma indictment, and affirmed his convictions on Counts 9 and 10.

a. The court held that the conspiracy offense charged in Count 1 was barred by this Court's decision in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). In *Grady*, the Court held that a subsequent prosecution was barred where "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."

110 S. Ct. at 2093. The court of appeals held that for purposes of applying *Grady* to a conspiracy charge, it is the conduct from which the jury is asked to infer a conspiratorial agreement—rather than the agreement itself—that is considered to be the conduct for which the defendant is prosecuted. Pet. App. 13a. The court then summarized the proof presented in the Missouri trial, as recounted by the Eighth Circuit, and concluded that "[a]s to Count 1, the conspiracy charge, the duplication was extensive." *Id.* at 15a.

The court pointed out that in both trials the government proved the whole course of conduct in which respondent learned to make methamphetamine and set up the Oklahoma lab. Furthermore, in both trials the government proved that, after the raid on the Oklahoma lab, respondent purchased chemicals and equipment for setting up a new lab and took delivery of those materials in Joplin, Missouri. The court noted that respondent's conduct in arranging for the purchase of the materials and taking delivery of them, were listed as overt acts in the Oklahoma conspiracy count. Pet. App. 15a-17a. The court also noted that both the Missouri indictment and the Oklahoma conspiracy count focused on the actions of respondent and Roach, and that both the Missouri and Oklahoma charges alleged conduct that took place outside their respective States. Finally, the court found that "the relevant time frames of the two indictments also overlap." *Id.* at 18a. The court stated that "[t]he Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987," while the Oklahoma conspiracy count charged conduct that occurred from approximately May 1,

1987, to August 31, 1987. *Ibid.* Based on those facts, the court concluded that the Oklahoma conspiracy count charged "the same conduct for which [respondent] was previously convicted in Missouri" and that prosecution on the Oklahoma conspiracy charge was therefore barred by the Double Jeopardy Clause. *Ibid.*

With respect to the substantive offenses charged in Counts 2 through 6, the court noted that in both trials the government proved that respondent had bought chemicals and equipment to manufacture methamphetamine, that he used those chemicals to produce methamphetamine at the Beggs, Oklahoma, trailer, and that the trailer was subsequently seized by law enforcement authorities. Pet. App. 18a-19a. That evidence was used to show intent in the Missouri trial and as direct evidence of the Oklahoma charges.[1] Because the government relied on the same evidence to prove critical elements of the substantive offenses charged in each case, the court of appeals concluded that respondent's convictions on Counts 2 through 6 had to be reversed. *Id.* at 18a-20a.

Finally, the court affirmed respondent's convictions on Counts 9 and 10, charging interstate travel on

[1] The court of appeals mistakenly stated that evidence of respondent's conduct in connection with the Beggs lab was used in the Missouri prosecution to "establish[]" the "substantial step" element of the attempt offense. Pet. App. 17a; see also *id.* at 20a. Compare 867 F.2d at 1071. As the excerpt from the Missouri jury instructions quoted above makes clear, the Missouri jury was instructed that it could consider the evidence only "on the question of motive, opportunity, preparation, plan, knowledge, identity or absence of mistake." Pet. App. 26a.

June 21 and July 13, 1987, to promote the manufacture of methamphetamine. According to the court, the conduct alleged in those counts was not sufficiently related to the conduct proved in the Missouri trial to require those counts to be dismissed under the Double Jeopardy Clause. Pet. App. 20a-21a.

b. Judge Anderson dissented from the dismissal of the first six counts of the Oklahoma indictment. He noted that, even after *Grady*, a mere overlap of proof in two prosecutions does not establish that the second prosecution is barred by the Double Jeopardy Clause. Pet. App. 23a & n.1. Instead, Judge Anderson explained, *Grady* requires a showing that (1) the conduct sought to be proved in the second prosecution "constitutes an offense for which the defendant has already been prosecuted," and (2) the conduct is "being proven to establish an essential element" of the second prosecution. Pet. App. 24a. In Judge Anderson's view, that test did not require reversal of any of respondent's convictions.

First, Judge Anderson argued that the conduct charged in the conspiracy count did not "constitute[] an offense for which the defendant has already been prosecuted." Pet. App. 24a. Although the Oklahoma conspiracy count contained two overt acts that pertained to the events that were the subject of the Missouri offense, Judge Anderson found that the inclusion of those overt acts did not convert the Oklahoma conspiracy into the "same offense" as the substantive crime of attempt for which respondent was prosecuted in Missouri. An attempt, he explained, consists of two elements—intent and a substantial step toward commission of the offense—and the proof that established the overt acts in the conspiracy indictment at most established the "substantial step" element of

the attempt offense. Pet. App. 31a. In Judge Anderson's view, *Grady* barred the conspiracy prosecution only if the government proved the entirety of the attempt offense (rather than a single element of that offense) in seeking to establish the conspiracy. Pet. App. 32a.

In addition, Judge Anderson concluded that the two overt acts relating to the Missouri attempt offense did not "establish an essential element" of the conspiracy charge. First, he noted, a drug conspiracy does not require proof of an overt act, and thus an overt act is not an essential element of the crime. Pet. App. 32a. Second, the overt acts relating to the attempt did not "establish" the element of agreement. Judge Anderson explained that while evidence of the Missouri offense might have tended to support the proof of agreement in Count 1 of the Oklahoma indictment, *Grady*'s requirement that the conduct charged in the prior offense "establish" an essential element of the subsequent offense means that the conduct must "constitute the entirety of" that element, not that it simply provides evidence that helps establish that element. Pet. App. 34a (quoting *United States* v. *Calderone*, 917 F.2d 717, 724 (2d Cir. 1990) (Newman, J., concurring)). In sum, Judge Anderson concluded, *Grady*'s plain language compelled the conclusion that the "conduct constituting the offense" for which respondent had previously been prosecuted, *i.e.*, "conduct constituting an attempt to manufacture methamphetamine between August 26 and 31, 1987," did not serve "to establish an essential element of the conspiracy charge" in respondent's Oklahoma prosecution. Pet. App. 39a.

With respect to the substantive counts, Judge Anderson noted that each of them "was based on [re-

spondent's] conduct on or before July 13, 1987, in establishing and operating the methamphetamine lab in Beggs, Oklahoma." Pet. App. 25a. In contrast, the Missouri court alleged conduct that took place more than a month later, on August 26-31, 1987. Pet. App. 25a. Although the government had introduced evidence in the Missouri trial concerning respondent's pre-August conduct, Judge Anderson stated that introducing evidence of a prior, uncharged act to establish the defendant's intent "is not prosecution for that act." Pet. App. 26a. Respondent's "involvement in manufacturing methamphetamine at the lab in Beggs, Oklahoma, was temporally and geographically separate from his subsequent attempt to manufacture methamphetamine in Missouri, which occurred over a month after the Beggs lab was raided." Pet. App. 27a.

SUMMARY OF ARGUMENT

I. It has long been settled that a conspiracy and a substantive offense committed in furtherance of the conspiracy may be prosecuted separately. The court of appeals nonetheless held that respondent's prior conviction on the Missouri attempt charge barred the conspiracy count of this indictment. To reach that result, the court of appeals invoked this Court's recent decision in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). *Grady*, however, is inapposite here.

Grady involved a single traffic accident that led to successive prosecutions, the first for traffic violations and the second for assault and homicide resulting from the accident. In the assault and homicide prosecution, the State proceeded on a theory whereby the fact that the defendant had committed the traffic violations that were the subjects of the earlier pros-

ecution would necessarily have established the State's case with respect to the defendant's conduct and mental state. The State could establish the assault and homicide offenses simply by proving the commission of the traffic violations and then showing that those violations resulted in injury and death. In effect, under the State's theory the traffic violations were lesser included offenses of the homicide and assault crimes.

The situation is quite different in the case of sequential prosecutions for a substantive offense and a related conspiracy charge. A substantive offense is not a lesser included offense of a conspiracy (or vice versa), because each offense requires proof of an element not required by the other, even if the two charges arise from the same transaction. In *Grady*'s terms, proof of the Missouri attempt offense would not have "establish[ed]" an essential element of the conspiracy charge, see 110 S. Ct. at 2093, although evidence relating to the Missouri offense was relevant in proving the conspiracy. *Grady* therefore does not support the court of appeals' conclusion that respondent's prosecution for conspiracy was barred by his prior prosecution for attempt.

II. The court of appeals also erred in reversing respondent's convictions of the five substantive counts relating to the Beggs, Oklahoma, drug laboratory. Those charges were not by any means the "same" for double jeopardy purposes as the previously prosecuted Missouri charge, which related to respondent's subsequent efforts to set up another drug laboratory. Although the evidence introduced against respondent in the two trials substantially overlapped, the mere overlap of evidence does not convert two offenses into one within the meaning of the Double Jeopardy

Clause. That principle has been established by a series of this Court's decisions, and it was reaffirmed in *Grady* itself. The court of appeals' reversal of respondent's convictions on the five substantive counts was therefore erroneous.

ARGUMENT

I. A CONSPIRACY AND A RELATED SUBSTANTIVE CRIME ARE NOT THE "SAME OFFENSE" FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE

A. This Court Has Always Treated Conspiracies And Substantive Crimes As Separate Offenses

Under the traditional test, two crimes are not "the same offense" within the meaning of the Double Jeopardy Clause if each requires proof of a fact that the other does not. *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).[2] That test has been applied to prosecutions for conspiracy and substantive offenses on numerous occasions, and this Court has consistently held that a conspiracy and a substantive crime arising from the same transaction are not the "same offense" for double jeopardy purposes.

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[2] As the Court stated in *Blockburger* itself, that test applies only where "the *same act or transaction* constitutes a violation of two distinct statutory provisions." *Blockburger* v. *United States*, 284 U.S. at 304 (emphasis added). The Court expressed "serious doubts" in *Garrett* v. *United States*, 471 U.S. 773, 790 (1985), whether the simple *Blockburger* analysis is applicable to compound-predicate offenses that by their nature require the proof of multiple acts of criminal conduct together with other elements. See 471 U.S. at 789 (counseling "caution against ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in *Brown* [v. *Ohio*, 432 U.S. 161 (1977),] to the multilayered conduct, both as to time and to place, involved in [*Garrett*]").

For example, in *United States* v. *Bayer*, 331 U.S. 532 (1947), the defendant, an Air Force officer, was found guilty in court-martial proceedings of receiving payments in return for transferring soldiers to noncombat units. 331 U.S. at 541. This Court held that his subsequent prosecution on charges of conspiring to defraud the government by depriving it of his faithful services was not barred even though it was based on the same underlying incidents. 331 U.S. at 533. As the Court stated, the "essence" of a conspiracy offense "is in the agreement or confederation to commit a crime," which "is punishable whether or not the contemplated crime is consummated." 331 U.S. at 542. The conspiracy charge thus required proof of an agreement, while the court-martial offense required proof of the completed crime. In language directly applicable to this case, the Court concluded that "the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself." 331 U.S. at 542. This Court has reaffirmed that principle often and recently. See *Garrett* v. *United States*, 471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 781-782 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946); cf. *Burton* v. *United States*, 202 U.S. 344, 377 (1906) (statute prohibiting both agreement to receive compensation unlawfully and receipt of such compensation defines two distinct crimes).

Under that principle, respondent's conspiracy conviction is not subject to challenge on double jeopardy grounds. Respondent was charged in the Oklahoma

indictment with conspiring with others to manufacture, possess, and distribute methamphetamine from May through August 1987. To convict respondent, the government had to prove that there was an agreement among at least two individuals to manufacture, possess, and distribute methamphetamine, and that respondent joined that agreement. The government did not have to prove that any substantial step was taken toward manufacturing methamphetamine. As the Eighth Circuit explained, to obtain a conviction in the Missouri case, the government had to prove that respondent took a substantial step toward manufacturing methamphetamine. 867 F.2d at 1071. But the government did not have to prove that he agreed with anyone to do so.

There is nothing unusual about the relationship between the conspiracy and attempt offenses charged in the two indictments at issue in this case. Defendants are often charged separately with a conspiracy and the substantive offense that was the object of the conspiracy. And it is not unusual for the two charges to be brought in separate prosecutions, particularly where, as in this case, the conduct pertaining to each offense was based in different jurisdictions.[3]

[3] The fact that this case involves an attempt as opposed to a completed substantive offense does not alter the analysis. See *United States* v. *Marden*, 872 F.2d 123, 125-126 (5th Cir. 1989); *United States* v. *Savaiano*, 843 F.2d 1280, 1282 (10th Cir.), cert. denied, 488 U.S. 836 (1988); *United States* v. *Alonso*, 673 F.2d 334, 337 (11th Cir.), cert. denied, 459 U.S. 874 (1982); *United States* v. *Anderson*, 651 F.2d 375, 378-379 (5th Cir. 1981); *United States* v. *Snell*, 592 F.2d 1083, 1085-1086 (9th Cir.), cert. denied, 442 U.S. 944 (1979); *Brinkley* v. *United States*, 560 F.2d 871, 874 (8th Cir.), cert. denied, 434 U.S. 941 (1977). The Ninth Circuit has held, as a matter of statutory construction (and not as a matter of double jeopardy law), that a single act may not be charged as both a conspiracy and an attempt under 21 U.S.C. 846. *United States* v. *Touw*, 769 F.2d 571 (9th Cir. 1985). While we believe that the decision in *Touw* is incorrect, the Ninth Circuit has in any event limited it to cases in which the attempt and the conspiracy arise from a single act; it does not apply where, as in this case, the defendant attempts or conspires to violate the drug laws on more than one occasion. *United States* v. *McQuisten*, 795 F.2d 858, 868 (9th Cir. 1986).

Before the decision of this Court two Terms ago in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), there would have been no question that the conspiracy charged in the Oklahoma indictment and the attempt charged in the Missouri indictment were separate offenses for double jeopardy purposes. The question posed by this case is whether *Grady* v. *Corbin* requires this Court to jettison a century of precedent and to hold that a conspiracy and a related substantive crime may not be the subject of separate prosecutions, because they must be regarded as the "same offense" within the meaning of the Double Jeopardy Clause.

B. *Grady* v. *Corbin* Did Not Alter The Well-Settled Rule That Conspiracies And Substantive Crimes Are Separate Offenses

The only support offered by the court of appeals for its departure from the settled principles discussed above was this Court's decision in *Grady* v. *Corbin*. *Grady*, however, does not govern this case.

1. The defendant in *Grady* was driving while legally drunk. His car crossed the median line of a two-way highway and hit another car, killing one of the occupants and injuring the other. The defendant first pleaded guilty to the traffic violations of driving while intoxicated and crossing the median line in con-

nection with an automobile accident. He was subsequently prosecuted on homicide and assault charges arising from the accident. See 110 S. Ct. at 2087-2089.

The second prosecution in *Grady* was not barred under the *Blockburger* "elements" test, because the traffic violations were not technically lesser included offenses of the homicide or assault charges. Cf. *Schmuck* v. *United States*, 489 U.S. 705, 715-721 (1989). The traffic violations required proof that the defendant was operating a motor vehicle, which was not required in the case of the homicide and assault offenses. The homicide and assault offenses, in turn, required proof of injury or death to another person, which was not an element of the traffic violations. Nonetheless, the Court held that the homicide and assault charges were barred because of the defendant's prior guilty pleas to the traffic violations. 110 S. Ct. at 2094-2095. The Court stated as the rule of the case that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 110 S. Ct. at 2093.

The Court in *Grady* relied heavily on the decisions in *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980). See *Grady*, 110 S. Ct. at 2090, 2092-2093 & n.11. In *Harris*, the Court held that a defendant could not be prosecuted for robbery with a firearm after having been convicted of felony murder based on the same robbery. The Court in *Grady* explained that the offenses at issue in *Harris* were not "the same" under the traditional *Blockburger* test because, "as a

statutory matter, felony murder could be established by proof of any felony, not just robbery, and robbery with a firearm did not require proof of a death." *Grady*, 110 S. Ct. at 2092. But even though the offenses were not the "same" under *Blockburger*'s pure statutory analysis, the Court held that the offenses were rendered the same by the manner in which they were charged and proved at trial. The prosecution in *Harris* apparently proved the greater offense of felony murder simply by re-proving the lesser offense of robbery in its entirety and adding evidence that a death occurred in the course of the robbery. See 433 U.S. at 682 n.*. For double jeopardy purposes, the Court concluded, the robbery should be treated as a lesser included offense of felony murder. See *Grady*, 110 S. Ct. at 2092-2093; *Illinois* v. *Vitale*, 447 U.S. at 420 (the Court in *Harris* "treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense").[4]

In *Vitale*, the State first convicted the defendant of carelessly failing to reduce speed to avoid an ac-

[4] Although *Whalen* v. *United States*, 445 U.S. 684 (1980), was a multiple punishment case rather than a successive prosecution case, the Court's analysis in *Whalen* paralleled its analysis in *Harris*. In *Whalen*, the defendant was convicted of both rape and felony murder; the felony murder conviction was based on a statute providing that a killing committed in the course of any of six specified felonies constitutes murder, even in the absence of an intent to kill. See 445 U.S. at 686. The Court treated the rape as, in effect, a lesser included offense of felony murder, explaining that it was "unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." 445 U.S. at 694. See also *Payne* v. *Virginia*, 468 U.S. 1062 (1984).

cident, and then prosecuted him for involuntary manslaughter based on the two fatalities that resulted from the accident. The Court noted that if a careless failure to slow is not always a necessary element of manslaughter, the two offenses would not be the "same" under the traditional *Blockburger* test. Nonetheless, the Court suggested that the State would face a "substantial" double jeopardy hurdle if it "[found] it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure." 447 U.S. at 420. In that event, the Court explained, the defendant would "already [have] been convicted [of] conduct that is a necessary element of the more serious [charge]." *Ibid.*

The Court's reasoning in *Grady* was similar to that in *Harris* and *Vitale*. In both *Grady* and *Harris*—and by hypothesis in *Vitale*—the State sought to establish both the defendant's conduct and his mental state by proving that he had committed the previously adjudicated offenses.[5] In each case, the greater offense required proof of other facts in addition to those involved in the lesser offense (such as

[5] To be sure, the State's bill of particulars in *Grady* stated that the State intended to prove the recklessness or negligence necessary to sustain the homicide and assault charges by proving not only that the defendant was guilty of the two traffic offenses for which he had already been convicted —driving while intoxicated and failing to keep to the right of the median—but also by proving that the defendant had committed a third traffic offense—driving faster than was safe in the road conditions that prevailed at the time of the accident. 110 S. Ct. at 2089. Insofar as the State intended to proceed on this third theory, however, the Court held that the prosecution would not be barred, a holding that paralleled the Court's analysis in *Vitale*. See *Grady*, 110 S. Ct. at 2094; *Vitale*, 447 U.S. at 421.

the victim's injury or death). But the Court held in both cases that a second prosecution could not proceed if, under the prosecution's theory of the case, proof of the greater offense would necessarily establish the lesser.[6] In that setting, the lesser offense would become simply an "incident[] included" in the greater offense, see *Harris*, 433 U.S. at 683, quoting *In re Nielsen*, 131 U.S. 176, 188 (1889), and successive prosecutions would be barred.

While *Grady* licensed a limited inquiry into the prosecution's proof for purposes of determining whether a successive prosecution would violate the Double Jeopardy Clause, it made clear that the Double Jeopardy Clause does not mandate a "same evidence" test. See 110 S. Ct. at 2093. That is, a second prosecution is not barred simply because the government proves the second offense by relying on the same evidence that it used to prove the first offense.

The *Grady* Court's disclaimer of any intention to create a "same evidence" test supports Judge Anderson's interpretation of *Grady* in the court below, *i.e.*, that *Grady's* reference to proving "conduct that constitutes an offense for which the defendant has already been prosecuted" does not mean that two offenses are the same for double jeopardy purposes if the government seeks to prove one of the offenses by introducing evidence that was used to prove the

[6] In *Harris*, the State prosecuted first for the greater offense of murder and then for the lesser offense of robbery with a firearm, while in *Grady* the order of prosecution was reversed. The *Grady* Court, however, expressly noted that "it is irrelevant for the purposes of the Double Jeopardy Clause whether the conviction of the greater offense precedes the conviction of the lesser offense or vice-versa." 110 S. Ct. at 2093 n.11.

other. The Court's formulation appears instead to be an effort to put in general terms the much more modest point that in order for two crimes to constitute the "same offense," one of them must be a lesser included offense of the other, either as a strictly legal matter or as a practical matter in light of the way the case is charged and tried. That is, it is not sufficient to avoid the double jeopardy bar that the second offense could theoretically be established without re-proving the first offense; if the government's theory of the case will require it to re-prove the first offense in order to establish the second, the second prosecution is barred. That interpretation of the Court's language in *Grady*, we submit, is consistent with the facts that were before the Court in *Grady*, and it accommodates *Grady* to well-settled principles of double jeopardy law such as the principle that a conspiracy and any related substantive crimes are separate offenses.

2. Under this analysis, *Grady* does not require dismissal of the conspiracy count in the Oklahoma indictment. In *Grady*, the State sought in effect to establish the defendant's mens rea and actus reus by simply re-proving the traffic violations for which he had previously been prosecuted. All that would remain to complete the proof of the assault and homicide charges would be for the State to show that the traffic violations resulted in injury and death. In this case, by contrast, re-proving the elements of the Missouri attempt offense would not establish the Oklahoma conspiracy offense or any essential element of that offense. There is no reason to believe that the government intended to prove—or could have proved—the agreement charged in the conspiracy count simply by proving that respondent had previ-

ously committed the offense of attempting to manufacture methamphetamine in Missouri.

Although respondent's conduct in connection with the Missouri attempt provided evidence of the nature and extent of the conspiratorial agreement, the agreement was not itself established by the evidence of respondent's Missouri conduct. The jury could have convicted respondent of the conspiracy count even if it disbelieved all the evidence concerning respondent's Missouri conduct, and it could have acquitted him of the conspiracy even if it had found that he committed the crime of attempt in Missouri. Accordingly, although evidence of respondent's Missouri conduct was probative as to the agreement charged in the conspiracy count, respondent was not in effect prosecuted a second time for attempting to manufacture methamphetamine in Missouri.

3. The court of appeals relied heavily on two factors in reversing respondent's conviction. First, much of respondent's conduct that was charged as part of the conspiracy count in this case was introduced in evidence in the earlier Missouri trial. Second, two of the acts that respondent committed in the course of his Missouri attempt offense were charged as overt acts in the Oklahoma conspiracy charge. Neither of those factors, however, provides a basis for holding that respondent's prosecution in this case was jeopardy barred.

a. The overlap in proof between the two cases does not establish a violation of the Double Jeopardy Clause. Indeed, if *Grady* is interpreted to foreclose prosecution for an offense simply because evidence of the commission of that offense was relevant to a prosecution for a different crime, the double jeopardy rule of *Grady* will have been converted into the

"same evidence" test. In that event, to avoid the bar of double jeopardy the government will have to avoid any reference in one prosecution to acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution. The Court in *Grady* disclaimed any intention to create such a rule, see 110 S. Ct. at 2093 & n.12, and such a rule, if adopted, would fly in the face of almost 100 years of this Court's precedents.

In *Gavieres* v. *United States*, 220 U.S. 338 (1911), a defendant was first convicted of behaving in an indecent manner in a public place, and was subsequently convicted of insulting or threatening public officials. *Id.* at 341-342.[7] The Court held that, notwithstanding the fact that "the acts and words of the accused set forth in both charges are the same," there was no double jeopardy bar to the second prosecution. *Id.* at 342. As the court observed, "while the transaction charged is the same in each case, the offenses are different." *Ibid.* See also *Burton* v. *United States*, 202 U.S. 344, 380 (1906) (no double jeopardy bar "if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*"); *Carter* v. *McClaughry*, 183 U.S. 365, 395 (1902).

If there were any doubt that mere overlap in proof is insufficient to trigger a double jeopardy bar, that

[7] *Gavieres* was a Philippines prosecution that arose while the Philippines were under United States jurisdiction. While the case was not governed directly by the Double Jeopardy Clause, it was governed by an Act of Congress that had been construed to provide an equivalent protection in Philippines prosecutions. See 220 U.S. at 341; *Kepner* v. *United States*, 195 U.S. 100 (1904). Accordingly, the Court's analysis in *Gavieres* is based on constitutional double jeopardy principles.

doubt was laid to rest in *Dowling* v. *United States*, 493 U.S. 342 (1990). The defendant in *Dowling* was convicted of bank robbery. To prove his identity at trial, the government introduced evidence under Fed. R. Evid. 404(b) concerning a previous, unrelated robbery for which the defendant had been tried and acquitted. The Court rejected the defendant's contention that his conviction had to be reversed on double jeopardy grounds. To be sure, the Court based this portion of its ruling on the collateral estoppel component of the Double Jeopardy Clause, which is inapplicable here because respondent was convicted in his earlier trial. But the Court in *Dowling* would never have had to reach the collateral estoppel issue if the Double Jeopardy Clause itself barred prosecution for an offense merely because the government intended to introduce a substantial amount of evidence at trial that had been introduced against the defendant in an earlier criminal trial for another offense.[8]

b. In reversing respondent's conviction, the court of appeals also relied heavily on the fact that two of the overt acts alleged in the conspiracy count related to respondent's purchase and possession of chemicals and equipment in late August 1987 in connection with his attempt to set up a second methamphetamine lab. The inclusion of those overt acts in the Oklahoma conspiracy count, however, does not affect the double jeopardy analysis.

[8] This Court's opinion in *Grady* cited *Dowling* with approval for the proposition that "the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." 110 S. Ct. at 2093.

First, 21 U.S.C. 846 does not require proof of an overt act. See, *e.g.*, *United States* v. *Clark*, 928 F.2d 639, 641 (4th Cir. 1991) (collecting cases). For that reason, the overt acts in this case were pure surplusage. The proof of the Missouri attempt therefore did not establish an essential element of the Oklahoma conspiracy charge.

Second, and more fundamentally, overt acts are simply steps taken to further the objectives of the conspiracy, which demonstrate that the conspiracy is in effect. See *Yates* v. *United States*, 354 U.S. 298, 333-334 (1957); *United States* v. *Britton*, 108 U.S. 199, 204-205 (1883). As noted above, even when the government is required to prove an overt act in a conspiracy case, the fact that particular overt acts are also substantive crimes does not render the conspiracy and the substantive crimes the "same offense" for double jeopardy purposes. See *United States* v. *Bayer*, 331 U.S. at 542.

Grady did not alter this basic principle of conspiracy law, as this case illustrates. Re-proving the Missouri attempt offense would help to prove the overt act requirement of the conspiracy, but it would not do so standing alone, because it would not establish that the conduct was committed in furtherance of the charged conspiratorial agreement. Proving the elements of the Missouri attempt offense therefore would not "establish" any overt act of the Oklahoma conspiracy. See *Grady*, 110 S. Ct. at 2094.

c. Aside from the court of appeals' mistaken reliance on the overlap in the evidence and allegations in the two indictments, the court fundamentally misapprehended the respective roles of the agreement charged in a conspiracy case and the conduct introduced by the government to prove that agreement.

Borrowing a theory recently adopted by the Second Circuit, the court explained that because the " 'agreement' in nearly all conspiracy prosecutions is not proved directly," but rather is inferred from "evidence of the conspirator's conduct," the conduct in most conspiracy cases "is the focus of the case." Pet. App. 13a (quoting *United States* v. *Calderone*, 917 F.2d 717, 721 (2d Cir. 1990), petition for cert. pending, No. 90-1527). From that proposition, the court concluded, following *Calderone*, that the government may not prosecute for particular conduct and then ask a jury to infer a conspiratorial agreement based on the same conduct. Pet. App. 13a.[9]

The court of appeals' characterization of the substantive conduct, rather than the agreement, as the essence of a conspiracy is at odds with a basic principle of conspiracy law. "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). Accord *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (agreement "is all but synonymous" with the conspiracy); *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954); *United States* v. *Bayer*, 331 U.S. at 542;

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[9] The Second Circuit has applied *Calderone* in *United States* v. *Gambino*, 920 F.2d 1108 (1990), petitions for cert. pending, Nos. 90-1689 & 91-31. Other courts of appeals have not followed *Calderone's* analysis on this point, but have employed an analysis similar to that of Judge Anderson in dissent below. See *United States* v. *Clark*, 928 F.2d 639, 642 (4th Cir. 1991); *United States* v. *Gonzalez*, 921 F.2d 1530, 1538 n.12 (11th Cir.), cert. denied, No. 90-7857 (Oct. 7, 1991).

Morrison v. *California*, 291 U.S. 82, 92-93 (1934). That is because an agreement to commit illegal acts poses special dangers to society, "independently of any other evil it seeks to accomplish." *Dennis* v. *United States*, 341 U.S. 494, 573 (1951) (Jackson, J., concurring). "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). Complicity also "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Id.* at 594. Finally, a conspiratorial agreement "is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915).

Although the government in many conspiracy prosecutions asks the jury to infer the agreement from actions taken by the conspirators to advance the goals of the conspiracy, it is the agreement that constitutes the offense. The actions that the government may prove as part of its case are simply evidence of that agreement. Because the court of appeals misapprehended that basic principle of conspiracy law, it erroneously concluded that, after *Grady* v. *Corbin*, a conspiracy and the substantive crimes committed by the conspirators constitute the "same offense" for double jeopardy purposes. Nothing in *Grady* leads to the novel conclusion that the conduct for which a defendant is prosecuted in a conspiracy case consists of the actions he has taken in furtherance of the conspiracy, rather than the act of agreement itself.

Grady therefore does not support the court of appeals' departure from well-settled principles of double jeopardy law as applied to conspiracies and their related substantive offenses.

II. RESPONDENT'S SUBSTANTIVE CONVICTIONS SHOULD NOT BE OVERTURNED MERELY BECAUSE THE SAME EVIDENCE WAS INTRODUCED AT RESPONDENT'S TRIAL ON THE MISSOURI ATTEMPT CHARGE

In addition to reversing respondent's conspiracy conviction, the court of appeals reversed his convictions on five of the substantive counts in the Oklahoma case. None of those counts charged respondent with a conspiracy, and the court's decision with respect to those counts thus does not depend on its analysis of the law of conspiracy. Rather, the court based its reversal of the substantive counts on the fact that evidence of the conduct charged in those counts had been introduced in the Missouri attempt prosecution.

1. It is plain from the indictments filed in this case (see Pet. App. 51a-61a) and in the Missouri case (see Pet. App. 62a-63a) that the court of appeals reversed respondent's convictions on substantive counts that are not in any conventional sense "the same offense" as the one charged in the Missouri case. Counts 2, 3, 4, and 5 of the indictment in this case all charge that respondent manufactured drugs or possessed drugs with intent to distribute them "[o]n or about the 13th day of July, 1987, in the Eastern District of Oklahoma." Pet. App. 55a-57a. Count 6 charges that respondent maintained a place and enclosure for manufacturing drugs "[f]rom on or about June 1, 1987, to on or about July 13, 1987, in the Eastern District of Oklahoma." Pet. App. 57a.

The single count of the Missouri indictment charges an attempt to manufacture drugs "[f]rom on or about August 26, 1987, to on or about August 31, 1987, in Jasper County, in the Western District of Missouri, and elsewhere." Pet. App. 62a.

To convict respondent on Counts 2-6, the jury therefore had to find that he was guilty of offenses in Oklahoma (not Missouri) on or about July 13, 1987 (not late August 1987), or before that time. By contrast, the jury in the Missouri case necessarily found that respondent was guilty of an offense in Missouri and other places (not solely in Oklahoma) in late August 1987 (not on July 13, 1987, or before). In short, the crimes charged in Counts 2-6 of the Oklahoma indictment related to the establishment and operation of the Beggs, Oklahoma, lab, while the crime charged in the Missouri indictment related to the attempt to set up another lab after the Beggs lab was raided. There is no reason why respondent's prosecution for narcotics offenses committed in connection with one lab should bar his prosecution for different offenses committed in connection with another.

2. The court of appeals erred in its analysis of Counts 2-6 because it assumed that, if the government's evidence in two criminal trials overlaps, those trials must be for "the same offense" for purposes of double jeopardy analysis. As pointed out above, that assumption finds no support in the cases of this Court or elsewhere in settled double jeopardy jurisprudence. Indeed, the court of appeals' holding in this case is squarely contrary to the holding of this Court in *Dowling* v. *United States*, *supra*.

As in *Dowling*, respondent was separately tried for two offenses. As in *Dowling*, the government at one of the two trials introduced evidence regarding respondent's conduct in committing the other offense. In both cases, the evidence of the other offense was admitted because it was relevant to the defendant's intent with respect to the offense on trial. In *Dowling*, this Court concluded that the evidentiary overlap created no jeopardy bar to the second trial. In this case, however, the court of appeals ruled that respondent's second trial was barred.

There are two possible distinctions between *Dowling* and this case, but neither supports the court of appeals' ruling. First, in *Dowling* the defendant was acquitted at his first trial, while in this case respondent was convicted in the earlier case. Yet that distinction suggests that this case should follow *a fortiori* from *Dowling*. The defendant's earlier acquittal in *Dowling* at least raised the issue whether the jury in the earlier case had disbelieved the government's evidence and, consequently, whether the government would run afoul of the collateral estoppel doctrine in introducing the same evidence in the defendant's later prosecution. That issue does not arise here, where there is no reason to believe that the jury that convicted respondent in Missouri decided *any* issue in respondent's favor.

Second, in *Dowling* evidence of the first-tried offense was introduced at the trial on the second, while in this case evidence of the second-tried offense was introduced at the trial on the first. That distinction, too, does not suggest any real difference between this case and *Dowling*. The underlying principle applicable to both cases is that the introduction of relevant evidence of particular misconduct is not the same thing as prosecution for that conduct. As Judge Anderson explained in dissent in this case (Pet. App. 29a n.6), any suggestion to the contrary is in-

consistent with this Court's holding in *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988), that a jury may accept similar act evidence if it could "reasonably conclude that the act occurred and that the defendant was [an] actor." That standard is substantially lower than the "beyond a reasonable doubt" standard that governs the jury's finding that a defendant committed the acts charged in a criminal indictment. The introduction of evidence in respondent's Missouri prosecution regarding his earlier activities in Oklahoma therefore did not in any way constitute prosecution for those acts or place him in jeopardy for that conduct. For that reason, the court of appeals was plainly in error when it held that respondent's prosecution on the substantive counts in the Oklahoma indictment was barred by former jeopardy stemming from his prosecution in Missouri for attempt.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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